No. 2430

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PARROTT & COMPANY (a corporation),

Appellant,

vs.

DOLBADARN CASTLE SHIPPING COMPANY, LIMITED (a corporation) claimant of the British bark "Dolbadarn Castle", her tackle, apparel and furniture,

Appellee.

BRIEF FOR APPELLEE.

IRA S. LILLICK,
Proctor for Appellee.

PERNAU PUBLISHING COMPANY

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BRIEF FOR APPELLEE.

We shall in our reply to the brief for appellant discuss in the same order in which they are made the points upon which appellant bases its claim that the decision of the lower Court should be reversed.

I.

Statement of the Case.

Appellant's statement of the facts admitted by the pleadings is correct, insofar as it states a part

of these facts (with the exception that claimant did not admit in its answer that the steel plates were shipped in good order and condition), but to the facts so admitted by the pleadings should be added the following:

The bills of lading, copies of which were attached to the libel and marked "Exhibit A" and "Exhibit B", provided (p. 11 and p. 15) that the cement and steel therein mentioned should

> "be delivered (subject to the exceptions and stipulations hereinafter mentioned) in the like good order and condition, at the aforesaid port of San Francisco unto order or to his or their assigns."

Among other exceptions therein mentioned were (p. 12 and p. 15):

> "The act of God * * * any act, neglect, or default whatsoever of Pilot, Master or Crew in the management or Navigation of the Ship, and all and every danger and accidents of the Seas, Canals and Rivers, and of Navigation of whatever nature or kind always mutually excepted."

In addition to the foregoing exceptions were the following (p. 11 and p. 15):

> "The Ship is not liable for leakage, breakage, loss or damage by heat, sweat, rust or decay, unless occasioned by improper stowage."

It was not admitted by the answer, as we have already stated, that the steel plates were shipped in good order and condition, but on the contrary it was alleged (p. 19) that when the steel plates were

received on board the vessel at Rotterdam "the said plates, or a portion thereof, were in a more or less rusty condition."

Captain Baxter testified (p. 216):

> "The mate signed for them, 'more or less rusty'. On the receipt that was presented to the mate he marked 'more or less rusty'.
>
> Q. Did you see them yourself?
>
> A. Yes, sir, I did.
>
> Q. You noticed their condition?
>
> A. They were slightly rusty.
>
> Q. Did you mark it so on the bill of lading?
>
> A. I did not.
>
> Q. You did not take any exception to their condition?
>
> A. The bills of lading cover rust, and that was pointed out to me by the charterers' agent in Rotterdam, and I wanted this clause put on the bills of lading, and they pointed out that clause on the bill of lading, so I signed a clean bill of lading on that account."

John Owen, the first mate of the vessel, also testified (p. 247) that the steel plates were "more or less rusty" at Rotterdam and said that he "notified it on the ship's notes"; that is, the receipts he signed for them.

The vessel was under charter to the libelant and the charter provided (p. 297) that the vessel should receive "from charterers or agents, a full and complete cargo of" iron and/or cement, balance coke and that the stevedore should be appointed by the charterers. In other words, the charterers selected the cargo.

The charter also contained the usual stipulations exempting the vessel and its owners from liability for the act of God, perils of the sea, etc.

II.

Specification of Errors Relied Upon.

Under the above heading, appellant boldly states that the Court below committed error in "ruling that, on the issues raised by the pleadings, the burden of showing improper stowage is upon the libelant." We do not so understand the Court's ruling. It was not made solely upon the issues raised by the pleadings; it was made upon the facts also. What the Court did hold was that the evidence showed that the cargo was damaged either by sea water or by moisture resulting from sweat. That under the terms of the bills of lading the vessel was not liable for loss suffered by the cargo owner from sea water because the evidence showed that the entrance of sea water into the hold had been the result of the unusual storms and extraordinarily heavy weather through which the vessel had passed. Nor, as the bill of lading exempted the vessel from such liability, unless due to improper stowage, was the vessel liable for loss suffered by the cargo owner from sweat or rust, unless the cargo owner proved that such sweat, or rust, was the result of improper stowage. In the words of the Court (p. 312):

"The bill of lading provides that the cargo shall be delivered in like good order and condition as when received subject to certain exceptions among which are the 'Act of God, and all and every danger and accidents of the seas'. It further provides that the ship is not liable 'for damage by heat, sweat or rust unless occasioned by improper stowage.' The damage complained of was the caking of the cement, and the rusting and pitting of the steel plates. This damage both to the cement and to the steel plates was occasioned by some form of moisture. If caused by the entrance of sea water, the ship cannot be held responsible, because the evidence is clear that whatever sea water entered did so by reason of the fact that the ship became strained by the storms and heavy seas encountered by her, and the damage falls within the first exception above noted. If the damage was caused by rust or sweat, then under the second exception the ship is not liable unless such sweat or rust was occasioned by improper stowage. The evidence offered by libelant tended to show that the moisture which caused the caking of the cement and the rusting and pitting of the plates was the result of sweat arising from the cargo of coke. If it be conceded that this fact is established, the burden of proving that the damage from such sweat was occasioned by improper stowage is upon the libelant. For once the damage is brought within the exceptions of the bill of lading, the ship is exonerated unless the libelant show that notwithstanding such exception the ship is liable because of some negligence; in this case—the negligence of improper stowage."

III.

Reply to Argument of Appellant.

A. THE BURDEN OF PROOF IS ON CLAIMANT TO SHOW AFFIRMATIVELY THAT THE CAUSE OF THE DAMAGE BY SEA WATER WAS PERILS OF THE SEA.

Appellant's first subheading under III we have modified by inserting after the word "Damage", the words "By Sea Water", because the Court found that as to the damage caused by sea water we had maintained the burden of proof upon us and brought ourselves within the provision of the bill of lading exempting us from liability therefor on account of the storms encountered by the vessel in her voyage from Rotterdam.

Either proctors for appellant have misunderstood the ruling made by the Court, or, in their anxiety to attempt to distinguish that ruling from the line of authority which warranted it, have tried to make it appear to be in conflict with the ruling upon the question before the Court in *The Folmina,* 212 U. S. 354. We agree with counsel for appellant in stating that the Court in *The Folmina* reaffirmed the principle laid down in *Clark v. Barnwell,* 12 How. 272, that an exception in the bill of lading of "perils of the sea" will not avail a vessel which delivers its cargo damaged by sea water without anything to indicate in any way how the sea water reached it. In the case at bar we *did* indicate how the sea water reached the cargo and the Court found (p. 312):

> "The evidence is clear that whatever sea water entered did so by reason of the fact that the ship became strained by the storms and heavy seas encountered by her."

The lower Court in its decision also reaffirmed the now well settled rule in cases of this character, of which *The Koranna,* 214 Fed. 172, is perhaps the most recent, reported in the bound volumes of the Federal Reporter.

> "It is well settled, I think, that, whenever damages which are attributable to causes excepted in the bill of lading are sustained in the transportation of merchandise, the burden of proof is upon the libelant to show that the loss occurred through the negligence of the carrying vessel as she is not permitted to exempt herself from the consequences of her negligence or lack of diligence and care in the transportation of property. The Lennox, 90 Fed. 308; The Koingen Luise, 185 Fed. 478."

A line of decisions of the Circuit Court of Appeals for the Second Circuit, before which more admiralty causes involving this point have come than any other of our Circuit Courts of Appeal, has firmly established the rule followed by the lower Court in this case. One of their latest decisions is that of *The Good Hope,* 197 Fed. 149. We shall quote from it in extenso on account of the reference appellant has made to the case of *The Folmina,* 212 U. S. 354, for this decision of the Supreme Court is referred to by the Court in *The Good Hope,* supra, and in so doing that Court states that there is nothing in the case which qualifies their previous

decisions, to which previous decisions we will hereafter refer.

In *The Good Hope,* the vessel had jute as a part of her cargo, which jute was badly damaged by "heat" or "heating". There was an exception in the bill of lading freeing the vessel from liability for damage from "heat". The Court said:

> "Among the exceptions in the bill of lading are 'heat' (or 'heating') and 'decay', and it is upon these exceptions that claimants rely to excuse the failure of the ship to deliver all the jute received in good condition. Undoubtedly the cause of the decay and loss was 'heat'—the evidence to that effect is undisputed—and heat is an excepted cause. The District Court held that the burden of showing that the heat was not caused by the negligence of the ship was on her. In this conclusion we cannot concur. It is contrary to the decisions of this Court in The St. Quentin, 162 Fed. 883, 89 C. C. A. 573, and The Baralong, 172 Fed. 220, 97 C. C. A. 24, following our earlier decisions in The Patria, 132 Fed. 972, 68 C. C. A. 397, and The Folmina, 153 Fed. 364, 82 C. C. A. 440. There is nothing in the opinion of the Supreme Court, in answer to the questions subsequently certified in The Folmina, 212 U. S. 354, 29 Sup. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748, which qualifies these decisions. The Folmina was a peculiar case; there being a disputed question of fact as to whether the damage was caused by salt water or by fresh water. On that question this court was divided. When the facts came to be certified to the Supreme Court, the finding of the majority of this court that it was caused by sea water was included, and the Supreme Court held that an exception of "perils of the sea" will not avail a vessel

> which delivers its cargo damaged by sea water without anything to indicate in any way how the sea water reached it, which was just what this court had already held in The Patria."

The proctors for libelant in *The Good Hope,* perhaps taking the same view of the ruling of the Supreme Court in *The Folmina* as that taken by proctors for libelant here, sought a disapproval of the comment made upon that ruling by the Court in the decision from which we have just quoted, and applied to the Supreme Court for a writ of certiorari but it was denied.

The Good Hope, 225 U. S. 713.

In *The Patria,* 132 Fed. 971 (C. C. A.) the Court said:

> *"It is, no doubt, the rule, as appellant contends, that, when the damage is manifestly of the sort excepted, the ship is under no obligation to show the promoting cause.* To illustrate, if the exception is 'damage caused by peril of the sea', and the cargo is landed drenched with salt water, it will be for the ship to show that the salt water found access to the cargo through the peril of the sea; *but if the exception is 'damage by breakage', and the article arrives broken, the ship is not required to show how it got broken*—although the libelant may show that negligence of those on the ship, or of those who stowed her or discharged her, caused the break, and, showing that, may recover."

In *The St. Quentin,* 162 Fed. 883 (C. C. A.) the lower Court had found in favor of the libelant but the case was reversed with instructions to dis-

miss the libel and the Court used the following language:

> "The bill of lading contains an exception of 'loss or damage * * * from * * * heat or fire on board, in hulk or craft, or on shore.' The District Court found that the injury to the shellac was undoubtedly caused by heat, and the evidence abundantly sustains the conclusion. Therefore the burden of establishing some negligence of the carrier rested upon the libelants, because the injury having resulted from an excepted cause, the carrier was not responsible unless his own negligence was affirmatively shown. Transportation Co. v. Downer, 11 Wall. 129, 20 L. Ed. 160; The Patria, 132 Fed. 972, 68 C. C. A. 397."

The Baralong, 172 Fed. 220 (C. C. A.), was another case involving damage to shellac by heat. It was commenced in the same District Court a short time after *The St. Quentin,* and that case having been decided in favor of libelant, upon the authority of the decision the District Court had rendered in *The St. Quentin* case, the Circuit Court of Appeals, after referring to their reversal of *The St. Quentin* case, made the following comment:

> "After careful consideration we are unable to differentiate between them in any material particular favorable to the libelant. Under both bills of lading we think that, in view of the exception of damage from heat, *the burden rested upon the libelant* to show that the carrier was negligent in stowing or ventilating the cargo or otherwise. This he failed to establish. Indeed, here the evidence goes far toward establishing freedom from negligence on the carrier's part. It follows, therefore, that the same

> principles which required this court to reverse the decision of the District Court in the case of The St. Quentin, 162 Fed. 883, require us to reverse its decree in the present case."

An application for a writ of certiorari was then filed by libelant but the Supreme Court denied it.

The Baralong, 215 U. S. 600.

We have referred to, and quoted from, so many cases all to the same point that we feel it unnecessary to quote from others, but a late case which reviews many of the cases we have cited and in which the Court uses almost the same language used by the lower Court in this case is that of *The Konigin Luise,* 185 Fed. 478 (C. C. A.).

This Court in a decision by Judge Gilbert, in *The Henry B. Hyde,* 90 Fed. 115, and before the line of decisions by the Circuit Court of Appeals of the 2nd Circuit, laid down the rule which, as we have shown, was later followed in the Supreme Court in *The Good Hope,* 225 U. S. 713.

Other cases to the same point are

The Oceana, 171 Fed. 175;
The Hudson, 172 Fed. 1005.

Proctors for appellant claim that the burden of proving that the ship was seaworthy and properly stowed, as well as, that the damage arose from a peril of the sea, was upon us. We submit that a reading of the testimony shows clearly that the ship was seaworthy as well as properly stowed, and if such burden was upon us we have sustained it.

No testimony was offered by libelant to contradict that of Captain Baxter (p. 209) that the ship was in good condition at the commencement of the voyage, having just passed a special survey, and having had her decks tested by Lloyd's surveyor; that of John Owen (p. 243) that at that time she was in good condition as to tightness and staunchness; and that of the carpenter, Olsson (p. 259), who testified that he was present when her decks were tested and her seams were tried and found to be in proper condition. All of which was sufficient to establish her seaworthiness, as the test is stated in

The Babin Chevaye, 208 Fed. 966 (9th Circuit, Opinion by Judge Wolverton);
The F. and T. Lupton, 182 Fed. 144;
The Wildcroft, 201 U. S. 378.

We quote, in a later portion of our brief, part of the evidence that was introduced proving that the vessel was properly stowed, and that her cargo was damaged by sea water coming into the vessel during the storms and heavy weather through which she passed. All of it, evidence of a character to bring us within the meaning of the language quoted by counsel for appellant from *The Queen,* 78 Fed. 151, 164.

B. AS TO APPELLANT'S CONTENTION THAT THE EVIDENCE DOES NOT SHOW THAT THE DAMAGE WAS CAUSED BY PERILS OF THE SEA.

1. Before discussing this point, we desire to call the attention of the Court to the fact that all of the

testimony of appellant's witnesses was heard in open Court and only the officers of the Dolbadarn Castle examined out of the presence of the Court. There is a mass of testimony in the record to support all of the findings. As to those points upon which the testimony was conflicting, the Court, after seeing and hearing appellant's witnesses, concluded that libelant was not entitled to recover. It seems to us obvious upon reading the record, that appellant has advanced no reason why this Court should violate one of its fundamental rules,—that it will not disturb the findings of a trial Court made upon disputed questions of fact when that Court has had before it the witnesses to judge, from their appearance and manner, of their credibility and what weight should be given to their testimony. Indeed, it has been held that to warrant this Court in reversing the findings of a lower Court in such a case as this it must *clearly* appear that there was error. This rule has been followed by an unbroken line of authority in this and other circuits.

Whitney v. Olsen, 108 Fed. 292 (9th Circuit, Opinion by Judge Hawley);

Alaska Packers Ass'n v. Domenico, 117 Fed. 99 (9th Circuit, Opinion by Judge Ross);

Baker-Whiteley Coal Co. v. Neptune Nav. Co., 120 Fed. 247;

The Oscar B., 121 Fed. 978 (9th Circuit, Opinion by Judge Morrow);

Paauhau Sugar Plantation Co. v. Palapala, 127 Fed. 920 (9th Circuit, Opinion by Judge Hawley);

Coastwise Trans. Co. v. Baltimore Steam Packet Co., 148 Fed. 837;
The Phila. B. & W. R. Co. v. The Southern Trans. Co., 205 Fed. 732;
Davis v. Schwartz, 155 U. S. 631.

The proctors for appellant claim that the testimony of W. H. Stewart, that the pitting of the steel plates "was in a large measure due to salt water", contains an admission that part of the damage was not caused by salt water and that it falls short of proving that the pitting was caused by perils of the sea. This criticism would be proper were it not for the testimony in the record as to the storms through which the vessel passed and her straining and the entrance of sea water into her holds during these storms. Proctors for appellant ignore the testimony of Captain Baxter:

> "We had one of the heaviest gales that ever I experienced during the 26 years (p. 210). As I said before, we had one of the worst gales that I ever experienced on this passage (p. 211). The first heavy weather lasted three days. There was a good deal of damage done. Stays carried away, sails blowed away. The bell was torn off its fastening and the forecastle head, the belfry, was smashed. The belfry was 8 feet above the main deck. There was a monstrous sea came over the bow that swept everything. It filled the decks fore and aft (p. 212). We had other heavy weather down towards Cape Horn off and on for about ten days, the effect of which was that her decks were strained and leaking in some places. I saw evidence of it underneath the deck on the cargo being discharged. I could see it had been wet at the seams. I

found that the salt water also went down in the hold at the opening about the main ventilator (p. 213). I could see traces of salt running down the tanks and on the edges of the plates which were piled up next the tanks. I could see where the water had come down and made its way over upon the plates (p. 214). The water entered through the decks during the storm. I could see the stains on the underneath part of the decks and also stains on the cement barrels (p. 227). The damage to the steel plates and to the cement came from stress of weather. The ship laboring and straining and leaking through the deck and also through water going down the main ventilator (p. 228). The water that came through the deck damaged the cement and the water that came through the ventilators damaged the steel plates (p. 230). The deck was leaking over where the coke was stored also (p. 231)."

The testimony of the mate, Owen, was also disregarded that he had been around the Horn two dozen times and on this voyage he experienced just as bad weather as he ever had; worse, if anything (p. 243); that he examined the deck of the vessel after she was discharged and found that she had been leaking and that evidences of the water having come through the seams could be seen on the wood (p. 244). This witness also testified (p. 245) that only the top row of the barrels containing the cement were damaged and that these barrels were below where the seams were shown to have leaked.

We will not quote at length the excerpts from the log which appear on pages 193 to 201, but feel that we need have offered no other evidence than that

contained in the log to prove the severity of the storms through which the vessel passed. The decks were repeatedly awash and the phrase "shipping heavy water" appears again and again.

2. APPELLANT'S CONTENTION THAT THE EVIDENCE OF LIBELANT SHOWS THAT THE CAKING OF THE CEMENT AND PITTING OF THE STEEL WERE CAUSED BY COKE SWEAT AND POOR VENTILATION.

The testimony quoted by appellant is all that of experts called to prove that the damage was caused by coke sweat and poor ventilation and this testimony is based partly upon examinations made of the plates and barrels after they had left the hold of the vessel. Appellant ignores entirely the testimony of John A. Bishop (p. 52) that when he heard that a claim was to be made against the vessel he immediately instructed Mr. Stewart to examine the iron to determine its condition and the cause of the damage and that Mr. Stewart reported that the damage was due to salt water.

W. H. Stewart testified (p. 44) that he was, and had been, Surveyor for Lloyd's Register for twelve years and that he had been called upon in 1910 to examine the steel plates in the cargo of the Dolbadarn Castle; that his examination was made by testing with nitrate of silver. That the reaction was that usually given by salt (p. 45). The test made by him was the usual and customary test applied by marine surveyors (p. 49) and that there was no question in his mind about the cause of the damage to the steel plates.

Captain Thomas A. Wallace, Marine Surveyor and Port Warden of the Port of San Francisco, who had during the previous four years examined approximately several hundred vessels (p. 61) and who remembered having examined the vessel at 8 A. M. when the hatches were taken off and again at 10 A. M. before they commenced to discharge (p. 62) testified that his examination showed that the top tiers of cement "right abaft of the main mast and out in the wings were, the iron hoops were rusted, and I got a hammer and tested the barrels, hammered them, and I told them there were a whole lot of the top tier that was caked". He then said that he made "the test immediately on the barrels and on the hoops" and they "showed salt water very plainly" (p. 63). The captain also testified that "right alongside the mast and the mast partners, around the mainmast, it showed where the water had leaked down there pretty badly".

Even Captain Pillsbury, libelant's witness, testified "there appeared to me to have been a leak in the decks or at the aft part of the hatch, or around the mainmast and some salt water got down through the decks around the mast" (p. 105). "The salt water came from the leaks through the decks and abaft the hatch and around the mainmast" (p. 106).

3. APPELLANT'S CONTENTION AS TO INHERENT PROBABILITY OF THE CORRECTNESS OF THE THEORY OF LIBELANT.

We are surprised that libelant admits that its case is based upon "theory". We submit that it is

a proper designation for the basis upon which libelant claims the right to recover. Notwithstanding the testimony, part of which we have just quoted, appellant claims under the foregoing subdivision of its brief that the damage to both cement and steel plates was spread all over. We feel that this particular portion of the brief calls for no further reply.

4. APPELLANT'S CONTENTION THAT THE FINDINGS OF THE COURT ARE INSUFFICIENT TO SUPPORT THE DECREE.

We are in doubt as to whether under this heading appellant claims that it was necessary for the lower Court to make findings upon the issues before it, or whether it is simply a broad statement that the decree entered should have been in favor of libelant and against claimant. Had the Court failed to write an opinion and had simply ordered the libel dismissed, the decree entered upon that order would have been as valid as it is now with proctors for libelant advised of why the court ordered it so dismissed.

In its opinion, the Court (p. 313) reviews the testimony and very clearly expresses why under the evidence the burden of proving improper stowage was shifted to the libelant and we would but be repeating what we have already attempted to make clear in the opening portion of this brief if we went into it fully again.

> "It having been shown that the vessel encountered storms of such violence as to reasonably account for the opening of the seams

in her decks and the consequent damage to her cargo, the burden of proof is upon the libelant to establish the fact of improper stowage, contributing to the strain upon the vessel's deck and the resulting injury thereto."

The Neptune, 6 Blatchf. 193; Fed. Cas. 10,118;

The Polynesia, 30 Fed. 210;

The Fern Holme, 24 Fed. 502;

The Burswell, 13 Fed. 904;

Clark v. Barnwell, 12 How. 272;

Muddle v. Stride, 9 Carr. & Payne 380.

No claim was made by libelant that the vessel was unseaworthy in any particular other than that indirectly questioned in the stowage of the cargo and having fully expressed its views about that matter the Court simply did not think it necessary to refer otherwise to the "seaworthiness" of the vessel.

C. APPELLANT'S CONTENTION THAT CLAIMANT FAILED TO SEGREGATE LIBELANT'S PERISHABLE CARGO FROM THE COKE CARGO BY A SUFFICIENT BULKHEAD.

This claim was answered by the lower Court as follows:

"The vessel was under charter to libelant, who selected the whole cargo, including the coke, so that no negligence may be inputed to the ship from the fact itself that coke formed a part of the cargo (p. 312). * * * *The bulkheads, however, were better ones for the purpose intended, than those generally in use at*

the time, and on the whole case I am not prepared to say that the stowage was not proper."

The owners of the Dolbadarn Castle in this case did much more than did the owners of the vessel in Ohrloff v. Briscal, 35 L. J. P. C. 63; where it was held not to be improper stowage to allow casks of oil to be stowed in the same hold with bales of wool and bales of rags, in ignorance that the wool and rags might become heated, and so might dry the staves of the casks and render them leaky. The Court there said:

"If the shipowners were ignorant of the consequences of taking such a cargo, we do not think it amounted to culpable negligence on their part to stow, in the only place they could be stowed, *the goods which under the charter-party the charterers had a right to insist, and did insist, should form part of the cargo. On this question it is, in our opinion, very material to consider not only that the charterers insisted, but also that the cargo was, according to the terms of the charter-party, received on board,* and stowed as it was presented for shipment by them; and that they were shown to be very frequently on board, as the stowage progressed, and were well acquainted with the mode of stowage (which was effected in a masterly way), and never made any complaint or objection to it. * * *

"Even if the appellants knew, or ought to have known, what the consequence of such a stowage must be, we are not prepared to say that they were guilty of negligence in not putting up bulkheads. Assuming that they could have been so constructed as to protect the part of the hold where the oil was stowed from the influence of the heat generated by the wool and

> rags, still this could not have been done without much trouble and considerable expense, which we cannot concede that the shippers had a right to throw on the shipowners, because the shippers chose to load the ship they had chartered with a cargo of such a nature. And to this we may add that, even supposing the shipowners to have been aware of the usual consequences of stowing such a cargo in the same hold, they might have well come to the conclusion that the shippers were also aware of them, and would not have put such a cargo on board unless they had been assured that the casks were of such extraordinary strength and goodness as to be capable of resisting the usual influence of a heated temperature."

In the discussion of the testimony introduced with respect to the cargo of coke, proctors for appellant rely here, as they did in the court below, upon the case of The Jean Bart, 197 Fed. 1002, but in that case the Court opened its opinion with a finding that the damage to the straw coverings in her cargo was not due to sea water. The log book of The Jean Bart was also found to have been falsified and in addition the Court specifically found that the testimony of both officers and crew was false. There the ship was also found unseaworthy because of inadequate ventilators as well as insufficient ventilation during the voyage. Here no question has arisen in that respect.

Assuming that we have not already shown that claimant is not liable for the loss suffered by libelant, the only point left for discussion is the question of the propriety of the use of bulkheads such

as those used on the Dolbadarn Castle. Mr. John A. Bishop testified that sweat does not necessarily arise from coke (p. 55) and that although he had had a number of cases where damages had arisen from coke he had also had a number of cases of coke cargoes that "had come out in perfect condition without any damage at all"; and that in cases "where the coke was laid on steel plates, and the steel plates came out in perfectly sound condition, where the coke was actually laid on steel plates!

Mr. Bishop also testified:

> "In the course of our business we have represented owners in probably 75 per cent of the cases of damaged cargoes coming to this port; a large number of those cases have been damaged due to carrying coke and general cargo. There were very serious claims in the year about 1908, 1909; so serious, that we decided to take it up with the various surveyors in the Port of San Francisco to determine whether or not coke and cement or general cargo could not be carried in the same ship without being damaged. I personally called a meeting of the various surveyors, and they recommended that bulkheads be built between coke and other general cargo. Those recommendations were forwarded by me personally to our representatives in London who issued circular notices to all ship owners in Great Britain and France, and the result of that notice was that bulkheads were put up, and this ship, I think, was one of the first ships to sail after that time, after receiving our notice and the recommendation which we had received from the surveyors in this port. Prior to that time, in a great majority of cases that came under our notice there were no bulkheads

at all between the coke and the general cargo. There were merely sails or matting dividing the coke and the general cargo."

The significance of Mr. Bishop's testimony can be best appreciated by reading it in the light of what the Courts have held sufficient to absolve the ship from the charge of improper stowage in cases of this character.

"'Was there a want of proper skill and care in stowing the cattle?' It is well settled that in determining what is proper stowage the customs and usages of the place of shipment are to be considered, and, if these customs are followed, and if none of the known and usual precautions for safe stowage are omitted, no breach of duty or negligence can be imputed to the ship, and in case of damage under great stress of weather the injuries will be ascribed to perils of the sea. The Titania, 19 Fed. 107."

The Tjomo, 115 Fed. 919.

"To determine whether the duty of properly stowing a cargo has been fulfilled it is necessary only to prove the customary method of stowing and loading."

The Dan, 40 Fed. 691;

The Keystone, 31 Fed. 412;

The Alexandria, 23 Fed. 826.

Judge Brown, in the leading case of *The Titania,* 19 Fed. 101, at page 107, states the rule as follows:

"The question of seaworthiness, therefore, as regards the implied warranty in favor of the insurer or of the shipper of goods, is to be determined with reference to the customs and usages of the port or country from which the

> vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters. If judged by this standard, the ship is found in all respects to have been reasonably fit for the contemplated voyage, the warranty of seaworthiness is complied with, and no negligence is legally attributable to the ship or her owners."

Even Captain Pillsbury, the expert called by libelant, and who testified that he was usually requested to examine cargoes because of their arriving in damaged condition, admitted that for a great many years Meyer, Wilson & Co., Balfour, Guthrie & Co., and other shipping houses here in San Francisco have shipped coke into this port in vessels also carrying general cargo and that in these sailing vessels the coke and general cargo were not in separate air-tight compartments (p. 107). Captain Pillsbury also, reluctantly, admitted that the salt water that leaked into the vessel would have caused sweat upon the vessel going down through the tropics and then after evaporating and being confined in the holds condensing upon going around the Horn, where it was cold (pp. 108-9).

The criticism of the testimony of H. L. E. Meyer, Jr., offered by appellant, can hardly be deemed of much importance in view of Mr. Meyer's testimony that his firm since 1881 has been receiving cargoes of coke with general cargo and during that time has handled as much as all the others together. He said (p. 163):

> "We have in fact in a good many ships found that ship owners in vessels where there was not a laid between-decks had used our steel beams for making a deck and there put the coke on top of the beams without any separation whatsoever and ships have escaped in practically every instance all damage."

One of Mr. Meyer's ships had arrived the day he was on the stand and two the day before, all having coke and steel in their cargoes, and they were stowed with ordinary wooden bulkheads (p. 164). In a word, it confirms the other testimony in the case that the bulkheads in the Dolbadarn Castle were as good as the best that had ever come into the Port of San Francisco and in connection with the testimony of Mr. Bishop proves beyond question that the vessel was stowed in a manner shown by "the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters" to have been proper. As stated by the lower Court in its opinion,

> "The bulkheads, however, were better ones for the purpose intended, than those generally in use at the time."

We respectfully submit that the decree of the District Court should be affirmed.

Dated, San Francisco,
March 1, 1915.

Ira S. Lillick,
Proctor for Appellee.